Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming")	)	CG Docket No. 11-116
Consumer Information and Disclosure	)	CG Docket No. 09-158
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170

COMMENTS OF INTERNET BUSINESS ASSOCIATION, INC.

Internet Business Association, Inc. ("IBA"), by and through its attorneys, submits these comments in response to the Federal Communications Commission's ("Commission's") Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceedings.[1]

I. INTRODUCTION

IBA assists small businesses with a customizable website design tool, web hosting, email services and other Internet support services. IBA's services make it easy for companies that are not already on the web to quickly establish a presence and to generate customers. The availability of billing through the customer's existing local telephone invoice is a key convenience for IBA's small business customers, many of whom do not have dedicated accounts payable departments and employees. IBA bills its services through the customer's local telephone company using third-party billing services and a billing aggregator.

The convenience of a single bill is becoming increasingly important to consumers and to competition. Many providers bill a "triple play" of services on one invoice, combining regulated

[1] *See Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming")*, CG Docket No. 11-116, Notice of Proposed Rulemaking, FCC 11-106 (rel. July 12, 2011) ("NPRM").

telephone services with non-telephony products such as Internet access, web hosting and television programming. Carriers also bill for affiliated service providers' services such as voicemail, inside wire maintenance, alarm monitoring and similar services. The availability of third-party billing for these services provides an important vehicle for unaffiliated providers to compete with the cost and convenience telephone companies offer to their own subscribers.

IBA is wholly committed to the Commission's goal in this proceeding – to prevent billing of unauthorized charges to consumers, a practice commonly referred to as "cramming." The bulk of the NPRM discusses proposals designed to achieve this goal by improving the information available on telephone bills and clarifying procedures for the offering of blocking of third-party charges. Assuming that these proposals could be implemented without increasing the cost of LEC billing or skewing competition between affiliated and unaffiliated providers of non-telecom services, IBA does not oppose the NPRM's proposals. However, IBA is troubled by suggestions that go beyond the format of telephone bills and intrude upon the terms of third-party billing services. In particular, IBA is concerned with the suggestion that the Commission could mandate LEC screening requirements that expose third-party service providers to non-governmental adjudication of the lawfulness of their services.

II. THE COMMISSION DOES NOT HAVE AUTHORITY UNDER THE COMMUNICATIONS ACT TO REGULATE CONTRACTS BETWEEN LECS AND THIRD PARTIES WISHING TO BILL SERVICES ON TELEPHONE BILLS

Since 1986, the Commission has relied upon market forces to discipline telephone company billing for third party charges. The industry has responded with a voluntary code of billing guidelines that ensure services are knowingly authorized and that enable billing agents to quickly identify and root out companies that violate the prescribed standards of conduct. These guidelines continue to be improved, with telephone companies and third-party billing agents

introducing a variety of new measures in the past year alone. IBA supports and adheres to these guidelines in its services.

Unfortunately, the NPRM threatens to upset this balanced approach and intrude upon private transactions that for 25 years have been held to be outside the Commission's jurisdiction. Specifically, the proposal to mandate "due diligence" by LECs (NPRM ¶¶ 63-65), unlawfully crosses the line into regulation of services not subject to Title II of the Communications Act.

The NPRM asserts that the Commission's authority to adopt cramming rules lies in Section 201(b) of the Act, which requires that "all 'practices...in connection with' common carrier services be 'just and reasonable.'"[2] However, Title II of the Communications Act only permits the Commission to regulate interstate communications offered on a common carrier basis. It does *not* give the Commission authority to regulate billing and collection services subject to private contracts between carriers and third-party service providers.

In 1986, the Commission specifically determined that "carrier billing or collection for the offering of another unaffiliated carrier is not a communication service for purposes of Title II of the Communications Act."[3] In making this finding, the Commission concluded that "[b]illing and collection service does not employ wire or radio facilities and does not allow customers of the service...to 'communicate or transmit intelligence of their own design and choosing.'"[4] The Commission correctly found that billing and collection is a "financial and administrative service"

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2 NPRM, ¶ 83.

3 *Billing and Collection Services*, Report and Order, 59 Rad. Reg. 2d 1007, ¶ 31 (1986) ("Billing and Collection Services Order"); *Billing and Collection Services (Reconsideration)*, Memorandum Opinion and Order, 1 FCC Rcd 445 (1986).

4 Billing and Collection Services Order, ¶ 32 (quoting *Nat'l Ass'n of Regulatory Util. Com'rs v. FCC*, 525 F.2d 630, 641 n.58 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) (quoting *Indus. Radiolocation Serv.*, Docket No. 16106, 5 FCC 2d 197, 202 (1966)).

that is "not subject to regulation under Title II of the Act."[5] Accordingly, the Commission in 1986 deregulated telephone company billing and collection services. LECs, therefore, no longer were required to offer billing and collection, and were given discretion to determine the terms and conditions upon which they would offer the service.

The Commission again confirmed its lack of authority in 1998. At that time, at the urging of the Commission, the telecommunications industry developed new anti-cramming guidelines.[6] The voluntary guidelines include procedures for comprehensive screening of products being charged to local telephone bills, LEC scrutiny of service providers, verification of end user approval of services being charged to their bills, customer dispute resolution procedures and other protections for consumers. With respect to verification of orders, the voluntary guidelines affirm that it is the service provider's responsibility to inform end users of all rates, terms and conditions of service and to obtain and retain the necessary end user authorization.[7]

Importantly, the Commission deliberately chose not to implement mandatory obligations, much like it did last week in connection with the "bill shock" proposal. In the News Release announcing the voluntary industry guidelines, the Commission noted that the guidelines had been developed quickly and "had traditional regulatory rulemaking processes been used, the project would have taken much longer to complete."[8] The Commission's role, the News Release continued, is to educate consumers and to help them understand their telephone bills (the latter role ultimately leading to the *Truth-in-Billing* rules).[9] The Commission did not assert a role in

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5 Billing and Collection Services Order, ¶¶ 32, 34.

6 *FCC and Industry Announce Best Practices Guidelines to Protect Consumers from Cramming*, FCC News Release (rel. July 22, 1998) ("News Release").

7 Anti-Cramming Best Practice Guidelines, July 22, 1998, at 14 (available at http://transition.fcc.gov/Bureaus/Common_Carrier/Other/cramming/cramming.pdf).

8 *See* News Release at 1.

9 *Id.* at 1-2.

regulating the terms of the billing relationship between LECs and third party providers. This is because the Commission recognized that third party billing services are not themselves subject to Title II.

Perhaps recognizing its tenuous claim of authority pursuant to Title II, the Commission also seeks comment on its ability to regulate cramming under its Title I ancillary authority.[10] The Commission restates the two-part test to exercise its Title I jurisdiction pursuant to last year's *Comcast* decision, but does not provide an analysis of those factors.[11]

Comcast bars the FCC from asserting jurisdiction over the billing relationship between LECs and their third party customers. Ancillary authority to regulate third party billing and collection services fails both parts of the two-part test for exercise of such jurisdiction. First, the Commission's general jurisdictional grant under Title I does not "cover the regulated subject..." of third-party billing services.[12] In the *Comcast* decision, Comcast conceded that this first test was satisfied because its Internet service qualified as a "interstate and foreign communication by wire."[13] In the instant case, however, billing and collections is not a communication service because, as the Commission previously determined, it "does not employ wire or radio facilities."[14] Therefore, the billing and collection arrangements between local exchange carriers and carrier or non-carrier third-party service providers are not a regulated subject pursuant to

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10 *See* NPRM, ¶ 85.

11 *Id.* (citing *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010)). The two-part test discussed further below states that the Commission "may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." *Comcast*, 600 F.3d at 646 (citing *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005)).

12 NPRM, ¶ 85.

13 *Comcast*, 600 F.3d at 646.

14 Billing and Collection Services Order, ¶ 32.

Title I of the Act and the Commission's assertion of Title I ancillary authority to regulate cramming fails the first part of the two-part *Comcast* test.

Second, even if third party billing services were within the subject matter of Title I, the proposals to regulate the content of those services are not "reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[15] In other words, in order for an action to fall within the Commission's ancillary authority, the action must be ancillary to some authority that the Commission does possess. For example, the regulation of cable TV services (prior to the 1984 Cable Act) was found to be ancillary to the Commission's regulation of broadcast TV services, which clearly were within the Commission's jurisdiction.[16]

Here, there is no connection between the substantive terms of third party billing and any area of the Commission's authority. The Commission has not established a record finding that its proposed regulation of the third party billing relationship is ancillary to any statutorily mandated responsibility. Oddly, the NPRM only cites to the Billing and Collection Services Order, in which the Commission determined *not* to exercise its ancillary jurisdiction because "no statutory purpose would be served by continuing to regulate billing and collection service...."[17] This statement confirms that the Commission may not reach beyond the form and content of bills to regulate the third party billing relationship itself.

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15 NPRM, ¶ 85. In the Billing and Collection Services Order, the Commission recognized that "[t]he exercise of ancillary jurisdiction requires a record finding that such regulation would 'be directed at protecting or promoting a statutory purpose.'" Billing and Collection Services Order, ¶ 37 citing *Second Computer Inquiry*, 77 FCC 2d 384, 433 (1979), *aff'd on reconsideration*, 84 FCC 2d 50, 92093 (1980), 88 FCC 2d 512 (1981), *aff'd sub nom. CCIA v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom. Louisiana P.S.C. v. United States*, 461 U.S. 938 (1983)).

16 *United States v. Southwestern Cable*, 392 U.S. 157 (1968).

17 Billing and Collection Services Order, ¶ 37.

Put simply, the Commission correctly concluded in 1986 that it does not have the authority to regulate third party billing services. Billing and collection services are not communications common carriage subject to its Title II jurisdiction, nor may the substantive relationship be regulated under the Commission's Title I jurisdiction. The Commission should limit the NPRM to proposals addressing bill presentment and disclosures only.

III. REQUIRING CARRIER ADJUDICATION OF VENDOR LEGAL COMPLIANCE WOULD VIOLATE DUE PROCESS REQUIREMENTS

Not only does the NPRM suggest regulation that exceeds its jurisdiction, but the "due diligence" proposal also raises significant constitutional concerns. Under the heading "Due Diligence," the NPRM seeks comment regarding whether the Commission should "require carriers, before contracting or agreeing with a third-party vendor to place its charges on customer telephone bills, to screen each such vendor to ensure that it has operated and will continue to operate in compliance with all relevant state and federal laws."[18] This proposal has many sub-components, suggesting that carriers should monitor complaint thresholds, refunds, unbillable charges, uncollectible charges and the like.[19] The proposal also apparently contemplates adjudications of the relationships between various companies, their ownership, or the participation in companies by particular individuals.[20]

At the outset, one component of this proposed test is impossible. There is no way for a carrier to determine that a vendor will or will not "continue to operate in compliance" with regulatory requirements. Any conclusion rendered by a telephone carrier about future conduct would be subjective at best, and pure speculation at worst. Such a proposal would subject third

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18 NPRM, ¶ 64.

19 *Id.*

20 *Id.*, ¶ 65.

party service providers to the unbridled whim of telephone carriers, under cover provided by a Commission mandate.

Even if the proposal were possible, the proposed screening of past conduct is unconstitutional. Under the proposal, telephone carriers would be required to make an independent determination whether a third party service provider complies with "all relevant state and federal laws." Telephone carriers cannot be delegated the responsibilities of state and federal law enforcement authorities. Carriers are not equipped to make such findings, and carriers do not provide the due process protections available in the case of government action.

The screening procedures that the NPRM suggests could constitute an uncompensated "taking" without due process under the Fifth Amendment of the U.S. Constitution. Contracts are protected property interests under the Fifth Amendment.[21] If a billing carrier were to deny billing (or reverse charges billed) based on the Commission's requirements, such action would constitute a "taking" of Service Providers' contractual rights without due process of law. The Commission cannot substitute private action for government action in taking amounts owed to the Service Provider – even where the subscriber has willingly paid the charges invoiced.[22]

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21 *See United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977).

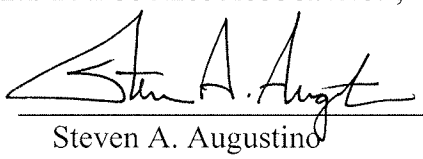
22 Carriers can and do conduct some screening of third party vendors pursuant to the rights and terms contained in third party billing contracts. Such screening is very different from what has been proposed in the NPRM. Carrier screening is governed by the mutually agreed terms of the billing contract. The parties can set independent complaint thresholds and remedies for complaints and unauthorized charges. Such flexibility would not appear to be possible under the proposal for a Commission mandate that carriers screen Service Providers and make a determination as to their legal compliance before entering into a billing contract. If a carrier determined that a Service Provider had violated a legal requirement, presumably the carrier would not be able to enter into a billing relationship with the Service Provider, even if the alleged noncompliance could be remedied in some fashion to allow the Service Provider to deliver desired services to consumers in a low-cost manner.

IV. CONCLUSION

Since 1986, the Commission has relied upon market forces to discipline telephone company billing for third party charges. The industry has responded with a voluntary code of billing guidelines that ensure services are knowingly authorized and that enable billing agents to quickly identify and root out companies that violate the prescribed standards of conduct. While not perfect, these guidelines continue to be improved, and have in fact been improved in the past year. IBA urges the Commission to continue to refrain from intruding upon private transactions that for 25 years have been held to be outside the Commission's jurisdiction.

Respectfully submitted,

INTERNET BUSINESS ASSOCIATION, INC.

By: 

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